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No. 76-199

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

WENDELL OLK, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (Pet. App. A) is reported at 388 F. Supp. 1108. The opinion of the court of appeals (Pet. App. B) is reported at 536 F. 2d 876.

JURISDICTION

The judgment of the court of appeals was entered June 1, 1976, and a petition for rehearing was denied on July 14, 1976. The petition for a writ of certiorari was filed on August 11, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether payments petitioner regularly received from patrons at gambling casinos where he worked as a dealer must be included in his taxable income.

STATUTES AND REGULATIONS INVOLVED

Sections 61(a)(1) and 102(a) of the Internal Revenue Code of 1954 (26 U.S.C.), and Treasury Regulations, Sections 1.61-1(a) and 1.61-2(a)(1) (26 C.F.R.), are set forth in the Appendix, *infra*, pp. 8-10.

STATEMENT

During 1971, the taxable year in issue, petitioner worked as a dealer at craps tables at two gambling casinos in Las Vegas, Nevada. The operation of a craps table generally requires the services of four persons, a "boxman" and three dealers. One dealer (the "stickman") calls the roll of the dice and collects the dice for the next player. The other two dealers collect losing wagers and pay winning wagers. The dealers are supervised by the boxman who, in turn, is supervised by the "pit boss." Although dealers are forbidden to engage in "unnecessary" conversation with patrons, they are expected to answer a player's general questions about the game and are required to repeat all bets, to make change for players, and to relay a player's beverage request to the boxman (Pet. App. A 2-3).

As a dealer, petitioner regularly received payments from players. These payments, known colloquially as "tokens," were made in the form of either direct cash payments to petitioner or bets placed by the players on behalf of petitioner. Petitioner and the other dealers "pooled" their tokens and divided them up into equal shares at the end of each shift (Pet. App. A 3).¹ During 1971, petitioner received \$3,750 in tokens in addition to

¹Although the casinos permitted the dealers to accept "tokens" from players, they prohibited the "boxman" and "pit boss" from accepting tokens because of their supervisory positions (Pet. App. A 3).

his reported salary of \$6,465 as a casino employee (I-R. 129; Ex. A).²

Petitioner did not include the "tokens" in his taxable income. On audit, the Commissioner of Internal Revenue determined that the "tokens" were part of petitioner's taxable income. In this refund suit brought in the United States District Court for the District of Nevada, the district court held that petitioner's tokens were nontaxable "gifts" from the casino patrons under Section 102 of the Internal Revenue Code of 1954 (Pet. App. A 12-13). The court of appeals unanimously reversed. It held that the tokens more closely resembled "commercial gratuities" which have long been recognized as a form of taxable income (Pet. App. B 20-21).

ARGUMENT

1. Section 61(a) of the Internal Revenue Code of 1954 provides that "gross income means all income from whatever source derived * * *." This Court has held that "this language was used by Congress to exert in this field 'the full measure of its taxing power' " and thus "to tax all gains except those specifically exempted." *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 429-430. In keeping with this broad statutory language, this Court has defined income under Section 61 to include all "accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." *Commissioner v. Glenshaw Glass Co.*, *supra*, 348 U.S. at 431.

One category of gross income specifically set forth in the statute is "[c]ompensation for services, including fees, commissions, and similar items" (Section 61(a)(1)). Treasury Regulations, Section 1.61-2(a)(1), Appendix, *infra*,

²"I-R." and "II-R." references are to the two-volume record in the court of appeals.

p. 9, provide that payments for services may take many forms including "[w]ages, salaries, commissions, * * * tips, bonuses * * *" and other payments.

In light of this broad statutory definition of gross income, the court of appeals correctly held that the tokens received by petitioner were identical to the "commercial gratuities" or "tips" received by employees in other occupations and were not nontaxable gifts. As the court stated, tokens, like tips, are received by those who are "engaged in rendering services * * * [and] in conformity with the practices of the area" and are "contributed by those with whom the taxpayers have some personal or functional contact in the course of the performance of the services" (Pet. App. B 21). Since it is well established that tips and similar payments are a form of taxable income (see *Commissioner v. Duberstein*, 363 U.S. 278, 285, n. 7), the court of appeals correctly concluded that tokens were simply another form of taxable compensation (Pet. App. B 21).³ Accord: *Beverly v. Commissioner*, 26 T.C. 1218 (tokens held to be taxable income).

The district court's finding (Pet. App. A 12) that players did not give tokens as a form of compensation for services is not inconsistent with the court of appeals' conclusion (Pet. App. B 14) that tokens constitute taxable income. In the case of tips, such receipts are treated as a form of compensation for services despite the fact that the payor might be prompted by non-compensatory motives. *Roberts v. Commissioner*, 176 F. 2d 221, 226 (C.A. 9). The critical factor is that tokens, like tips, are received "as an incident to the service which [the recipient] * * *

³The fact that the casino management permitted dealers to accept tokens while prohibiting other employees from accepting them indicates that the management exercised control over the "toking" practice and suggests that the practice was compensatory in nature.

render[s] to his patrons." *Roberts v. Commissioner*, *supra*, 176 F. 2d at 226.

2. The court of appeals correctly rejected the district court's conclusion that tokens constituted non-taxable "gifts" within the meaning of Section 102(a) of the Code, Appendix, *infra*, p. 9 (Pet. App. B 20). As this Court has held, a nontaxable "gift" must be the product of "detached and disinterested generosity." *Commissioner v. LoBue*, 351 U.S. 243, 246; *Commissioner v. Duberstein*, *supra*, 363 U.S. at 285. A transfer is the product of "detached and disinterested generosity" if it proceeds from "affection, respect, admiration, charity, or like impulses." *Commissioner v. Duberstein*, *supra*, 363 U.S. at 285.

Here, in the commercial context in which these tokens were paid, there is no evidence establishing detached and disinterested generosity. While the district court premised its conclusion that the tokens were gifts on its finding that they were given as a "result of impulsive generosity or superstition on the part of players" (Pet. App. A 12), the court of appeals correctly concluded that this finding does not support the ultimate conclusion that tokens were the product of "detached and disinterested generosity." As the court of appeals stated, a payment which proceeds from superstitious belief that the payment will bring the player good fortune is in no way detached and disinterested (Pet. App. A 20). Moreover, any suggestion that tokens were the simple product of "impulsive generosity" of winning players desiring to share their good fortune (Pet. App. A 10) is contrary to the evidence, which showed that tokens were given to the dealers by winners and losers alike (II-R. 37).

3. Contrary to petitioner's contention (Pet. 7-8), the decision below does not conflict with either *Commissioner v. Duberstein*, *supra*, or *United States v. Kaiser*,

363 U.S. 299. In *Duberstein*, this Court held that when a case is tried without a jury, the trial court's findings may not be disturbed on appeal unless they are "clearly erroneous." See Rule 52(a), Federal Rules of Civil Procedure. The companion decision in *Kaiser* held that a jury acted within its competence in finding that strike benefits rendered to a class of persons in economic need were nontaxable gifts. Here, however, the court of appeals did not disturb the district court's findings as to the underlying facts or the inferences to be drawn from those facts. It ruled that the facts did not support the district court's conclusion of law that tokens were the product of "detached and disinterested generosity." See *Poyner v. Commissioner*, 301 F. 2d 287 (C.A. 4). Indeed, the court of appeals accepted the district court's finding (No. 17) (Pet. App. A 12) that the tokens were given as a result of impulsive generosity or superstition and not as a form of compensation. These motives, however, are not equivalent to the gift motives required under *Duberstein*: affection, respect, admiration, charity, or like impulses.⁴

⁴The district court labeled its conclusion (No. 18) (Pet. App. A 12) that the tokens were a product of "detached and disinterested generosity" a finding of fact, but the court of appeals properly treated it as a conclusion of law because the formulation is the legal characterization of a gift employed in *Duberstein* (Pet. App. B 18). See *Poyner v. Commissioner*, *supra*. But even assuming *arguendo* that the district court's conclusion that tokens are the product of detached and disinterested generosity is a derivative finding of fact, the court of appeals made it clear that such a finding could not be reconciled with the underlying findings as to the players' motives in giving tokens (Pet. App. B 20-21).

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 61. GROSS INCOME DEFINED.

(a) *General Definition.*—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

- (1) Compensation for services, including fees, commissions, and similar items;
- (2) Gross income derived from business;
- (3) Gains derived from dealings in property;
- (4) Interest;
- (5) Rents;
- (6) Royalties;
- (7) Dividends;
- (8) Alimony and separate maintenance payments;
- (9) Annuities;
- (10) Income from life insurance and endowment contracts;
- (11) Pensions;
- (12) Income from discharge of indebtedness;
- (13) Distributive share of partnership gross income;
- (14) Income in respect of a decedent; and
- (15) Income from an interest in an estate or trust.

* * * * *

SEC. 102. GIFTS AND INHERITANCES.

(a) *General Rule.*—Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.

* * * * *

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):

§1.61-1 *Gross income.*

(a) *General definition.* Gross income means all income from whatever source derived, unless excluded by law. Gross income includes income realized in any form, whether in money, property, or services. Income may be realized, therefore, in the form of services, meals, accommodations, stock, or other property, as well as in cash. Section 61 lists the more common items of gross income for purposes of illustration. For purposes of further illustration, §1.61-14 mentions several miscellaneous items of gross income not listed specifically in section 61. Gross income, however, is not limited to the items so enumerated.

* * * * *

§1.61-2 *Compensation for services, including fees, commissions, and similar items.*

(a) *In general.* (1) Wages, salaries, commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips, bonuses (including Christmas bonuses), termination or severance pay, rewards, jury fees, marriage fees and other contributions received by a clergyman for services, pay of persons in the military or naval forces of the United

States, retired pay of employees, pensions, and retirement allowances are income to the recipients unless excluded by law. Several special rules apply to members of the Armed Forces, Coast and Geodetic Survey, and Public Health Service of the United States; see paragraph (b) of this section.

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